United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-1013

To be argued by
ROBERT B. MAZUR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1013

UNITED STATES OF AMERICA,
Appellee,

—v.—

KIM CRANSHAW,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Kim Cranshaw appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 17, 1976, after a four-day trial before the Honorable Lloyd F. MacMahon, United States District Judge, and a jury.

Indictment 76 Cr. 967, filed October 15, 1976, charged Kim Cranshaw and Walton Claxton in Count One with bank robbery, in Count Two with armed bank robbery, and in Count Three with carrying a firearm in the commission of a felony, in violation of Title 18, United States Code, Sections 2113(a), 2113(d) and 924(c), respectively.

Trial commenced against Cranshaw and Claxton on November 29 and concluded on December 2 when Cranshaw was found guilty on all counts. Claxton was acquitted by the jury on all counts.

On December 17, Cranshaw was sentenced to a term of up to eight years' imprisonment on Count Two under the provisions of Title 18, United States Code, Section 5010(c), and he is now serving that sentence.*

Statement of Facts

The Government's Case

A. The Chemical Bank Robbery

On August 30, 1976, Kim Cranshaw and two others, armed with guns, robbed the branch of Chemical Bank located at 453 East 86th Street, New York, New York, of approximately $19,948 in cash.

Upon entry into the bank, two of the robbers joined the common customer line which fed the various tellers' stations. Shortly thereafter, the third robber, Cranshaw, announced the robbery, pointed a gun at a teller, Velma Graham, and then vaulted over the tellers' counter. At the same time, one of the robbers on the common feed line proceeded to the officers' platform area in the rear of the bank and pointed a gun at two of the officers and some customers. The third robber took control of the area of the bank near the front door. (App. 7-10; Tr. 94-98; GX 1-3).**

After vaulting the tellers' counter Cranshaw pulled a plastic bag from his coat and began collecting money from several tellers. When Cranshaw arrived at Velma

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* No sentence was imposed against Cranshaw on Count One on authority of *United States* v. *Mariani*, 539 F.2d 915 (2d Cir. 1976). Imposition of sentence was suspended on Count Three.

** References to the Joint Appendix are cited as "App.". References to the trial transcript are cited as "Tr.". "GX" refers to Government Exhibit.

Graham's station, he pointed his gun at her and instructed her to come with him. The two proceeded to Graham's cash drawer where Cranshaw removed money. Cranshaw then leaped back over the counter to the bank floor, joined his two other associates and all three made a quick getaway from the bank. As the robbers left, Cranshaw threatened that anyone who attempted to observe where they were going would be in "big trouble". (App. 10-12).

B. Identification of Cranshaw as the Vaulter

Velma Graham identified Cranshaw at trial as the man who, to the best of her recollection, vaulted the tellers' counter and pointed a gun at her during the August 30th robbery. (App. 27).

Graham further testified that the vaulter wore a black coat, brown curly wig, cap and dark glasses during the robbery, and that he was between 20 and 22 years of age, tall, slim and of light complexion. She identified certain surveillance photos, taken during the robbery, as depicting the vaulter. (App. 12-14; GX 4, 4a).* The jury was given the opportunity to compare these surveillance photographs with Cranshaw at close range. (Tr. 108-10).

On September 30, 1976, Special Agent Samuel Wichner of the Federal Bureau of Investigation displayed a spread of six photographs (GX 9) to Graham and asked if she could identify any of the individuals as one of the bank robbers. Graham selected a photograph of Cran-

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* The two surveillance photographs which comprise GX 4 show a frontal view of Cranshaw before he vaulted the counter. (See GX 3).

shaw (GX 9a) "as the man who jumped the counter." The same day Graham executed a written statement concerning her identification of Cranshaw (GX 10):

> "Agent Wichner showed me a set of 6 photos. I picked out one of the photos as the individual who vaulted the teller counter on the day of the robbery. I picked him because I remembered his face." (App. 24-27, 62, 69-70).

On cross-examination Graham testified that upon viewing the photospread on September 30, she hesitated between the Cranshaw photograph and another before picking Cranshaw. (App. 37-39).* As to her in-court identification, Graham admitted she was "not positive" that Cranshaw was the vaulter. (App. 70-71).

C. The Arrest of Cranshaw and his Confession

On October 7, 1976, Cranshaw was arrested by New York City Housing Authority Police officers at the Fort Greene projects in Brooklyn on unrelated state charges. Shortly thereafter, the officers, who knew that Cranshaw was wanted by the FBI in connection with a bank robbery, advised the FBI of Cranshaw's arrest. Special Agent Wichner and another responded to the Fort Greene projects and placed Cranshaw under federal arrest for robbery of the Chemical Bank at 86th Street and York Avenue. Cranshaw was then taken to FBI headquarters in Manhattan. (App. 62-64, 70-72; Tr. 111-13).**

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* On redirect examination Graham explained that her recollection of the vaulter as a young man aided her ultimate selection of the Cranshaw photograph. (App. 59).

** Wichner told Cranshaw that he would be transported to FBI headquarters in Manhattan and that he should not make any statements until they left the precinct. Wichner also obtained certain of Cranshaw's personal effects including five Polaroid photographs (GX 13, 13a) which had been seized from him by the Housing Authority officers.

En route to headquarters, Wichner again told Cranshaw that he was under arrest for bank robbery and orally advised him of his constitutional rights. Wichner also sought to obtain Cranshaw's cooperation and advised him that the FBI could not guarantee him anything, but if he did cooperate, Wichner, in Cranshaw's presence, would convey such cooperation to the Assistant United States Attorney handling his case.*

Wichner then showed Cranshaw one of the Polaroid photographs (GX 13a) which earlier had been taken from him and which depicted Cranshaw and another black man. In response to Wichner's question, Cranshaw said that the other individual was "Bubby", whom he later identified as Frank Lewis. Wichner then reiterated that Cranshaw should think about cooperating. (App. 75-77).

Upon arrival at FBI headquarters, and after he was afforded an opportunity to eat dinner, Cranshaw read and executed a written advice of rights and waiver form. (GX 14). Wichner then showed Cranshaw a bank surveillance photograph of the vaulter taken during the course of the Chemical robbery on August 30.

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* On November 9, 1976, the trial court held an evidentiary hearing on Cranshaw's motion to suppress his post-arrest confession on the ground that it was involuntary. The motion was denied. (Transcript of November 9, 1976, 19-39, 57-67, 71-83, 128-46). During the second day of trial, Cranshaw again moved to suppress his confession, this time on authority of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). A second evidentiary hearing was held and the motion was denied. (Tr. 121-27, 131-32, 163-201). On the morning of the third day of trial, a third suppression hearing was held, based upon Cranshaw's contention that it was made during a period of unnecessary delay prior to his presentation to a magistrate. Following that hearing this last motion was also denied. (Tr. 208-60). Cranshaw does not attack the correctness of these rulings on this appeal.

Cranshaw admitted that it was a picture of him and wrote on the back, "This is a picture of me, [signed] Kim M Cranshaw." Wichner also produced surveillance photographs of the two other Chemical robbers. Cranshaw said that he knew one robber, although not by name, and did not know the other. (App. 78-82; GX 15).

Wichner again showed Cranshaw the Polaroid photograph, (GX 13a). Cranshaw admitted that this was a picture of Frank Lewis and advised that he was fearful of Lewis.* Cranshaw then added that Lewis had brought Cranshaw and the two other Chemical robbers together and had driven the getaway car. (App. 82-83).

Wichner inquired further as to Cranshaw's own role in the Chemical robbery. Cranshaw answered that he had vaulted over the tellers' counter. (App. 84).

D. Cranshaw's Similar Acts—The Manufacturers and Two Prudential Bank Robberies

1. Cranshaw's confession

During his interview with Wichner on October 7, Cranshaw examined surveillance photographs (GX 16) taken during the armed robbery of the Manufacturers Hanover Trust Company, 2084 Linden Boulevard, Brooklyn, New York, on September 8, 1976, nine days after the Chemical robbery. Cranshaw admitted to Wichner that one of the pictures was of him. He identified a

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* Cranshaw said that he knew Lewis had committed another bank robbery, for which the latter had been taken into federal custody; that on one occasion he had gone to Chicago with Lewis; that he and Lewis were going to rob a bank in Chicago; that he had had an argument with Lewis about the proceeds of a bank robbery and that Lewis had hit him over the eye.

second picture as that of Frank Lewis. Cranshaw said that he did not know the third robber. Cranshaw also told Wichner that Lewis had exchanged gunfire with someone as they left the bank. (App. 84-86).

Wichner then showed Cranshaw a surveillance photograph (GX 18) taken during the robbery of the Prudential Savings Bank, 418 Myrtle Avenue, Brooklyn, New York, on July 29, 1976—one month prior to the Chemical robbery. Cranshaw admitted that the picture was of him, and that he had robbed the Prudential bank on his own because his mother needed money. He stated that he delivered the proceeds of this robbery to her. Cranshaw also admitted that he and Frank Lewis had robbed the same Prudential bank again in August, 1976. (App. 86-88).

Finally, Cranshaw told Wichner that he had met with Lewis on October 5, 1976—two days prior to Cranshaw's October 7 arrest—and had agreed to meet Lewis on October 7 in a Harlem bar to plan a bank robbery for the following week. (App. 87).

2. Other evidence concerning the similar act robberies

A surveillance photograph taken during the July 29 Prudential robbery (GX 18) clearly depicted Cranshaw announcing the robbery to a teller. Similarly, surveillance photographs taken during the September 8 Manufacturers' robbery (GX 19, 20) showed Cranshaw, first holding a gun on a bank guard, then vaulting the tellers' counter and going to certain tellers' stations, and finally vaulting back onto the banking floor and exiting the bank. Another photograph (GX 19) showed an armed black man controlling the front door area of the bank during the robbery. Comparison of GX 19 with GX 13a—the Polaroid photograph of Cranshaw and Frank Lewis—demonstrated that it was Lewis

who controlled the front door during the Manufacturers robbery.*

The Defense Case

Cranshaw presented no evidence.

ARGUMENT

POINT I

The Trial Court Properly Admitted Evidence Of The Prudential Bank Robberies As Prior Similar Acts.

Cranshaw contends that the trial court committed error in admitting proof that, within one month prior to the Chemical robbery charged in the indictment, Cranshaw had participated in two additional bank robberies at a Prudential Savings Bank branch in Brooklyn. In the circumstances of this case—where the sole issue was one of identity and where Cranshaw claimed that the

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* The Government also called as a witness Patrick Price, an officer of the New York City Housing Authority Police Department, who was standing about three blocks away at the time of the Manufacturers robbery. He heard five gunshots and then observed four men in a blue car, bearing New York State license plate number 94L276, stop in front of him. One of the men looked at him and said, "There is a cop." The car then sped off. (Tr. 135-37).

George Farrar, owner of G & J Auto Repair, testified that he rented the same vehicle observed by Price to one "Herbert Clifton" on August 1, 1976. "Clifton" was still the lessee on September 8. Farrar identified Walton Claxton, Cranshaw's co-defendant, as "Herbert Clifton". (Tr. 137-41).

About five hours after the Manufacturers robbery, a Special Agent of the FBI observed Claxton drive into G & J Auto Repair in the getaway car. (Tr. 147-49).

most damaging evidence of his identity, his post-arrest confession, was the product of Special Agent Wichner's design—the admission of evidence of these prior similar acts, together with a clear limiting instruction (App. 212-13), were entirely proper.

Contrary to Cranshaw's formulation of the applicable rule, the law in this Circuit plainly permits introduction of relevant evidence relating to prior similar unlawful acts, except where the sole purpose of such evidence is to show bad character or criminal disposition. Thus, in *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975), this Court emphasized:

> "[W]e are by now firmly wedded to the inclusory form of the rule, that evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character."

Accord, *United States* v. *Chestnut*, 533 F.2d 40, 49 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3250 (October 5, 1976); *United States* v. *Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3253 (October 5, 1976); *United States* v. *Johnson*, 525 F.2d 999, 1006 (2d Cir. 1975), *cert. denied*, 424 U.S. 920 (1976); *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975); *United States* v. *Campanile*, 516 F.2d 288 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130, 140-41 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Miller*, 478 F.2d 1315 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973); *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir. 1970); *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1967); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967).

Cranshaw argues that there was little, if any, relevance to the proof of the prior Prudential robberies committed by him. Evidence of the July 29 and mid-August Prudential robberies, however, was admissible for any of several distinct purposes: proof of identity in that, among other things, it corroborated the testimony of Special Agent Wichner as to Cranshaw's post-arrest statements; proof of a common scheme and general plan involving Cranshaw and Frank Lewis, who together committed the second Prudential, Chemical and Manufacturers robberies; and, to a lesser extent, proof of motive.*

Not surprisingly, the sole issue in Cranshaw's case was identity: there was no dispute that the Chemical robbery took place on August 30, 1976. (Tr. 21-25; App. 172-93). Accordingly, proof of the prior Prudential robberies was admissible on this issue alone. The most damaging proof identifying Cranshaw as the vaulter in the Chemical robbery was Special Agent Wichner's testimony as to Cranshaw's confession, which confession also embraced the Manufacturers and Prudential robberies. Thus, proof as to the Prudential robberies bolstered Wichner's credibility and answered Cranshaw's purported defense that his confession had been manufactured.

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* Identity, plan and motive are among the purposes expressly recognized as grounds for the admission of similar act testimony. Thus, Rule 404(b) of the Federal Rules of Evidence specifically provides:

> "Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of *motive*, opportunity, intent, preparation, *plan*, knowledge, *identity*, or *absence* of mistake or accident." (Emphasis supplied).

In defense counsel's opening, cross-examination of Wichner and summation, he argued unsuccessfully to the jury that Cranshaw's confession was not reliable and, indeed, had been made up by Wichner. In the face of this attack on the validity of the confession and Wichner's credibility, proof of the first Prudential bank robbery—in the form of both Cranshaw's admission and the surveillance photograph—went directly to an issue raised by the defendant and served to provide an independent basis for the trustworthiness of Cranshaw's confession. Similarly, Wichner's testimony concerning Cranshaw's statement that he committed the second Prudential robbery with Frank Lewis completed the full account of defendant's confession and was properly admitted to establish the genesis of the joint venture to commit bank robberies with Lewis and others which led to the Chemical and Manufacturers robberies. See, *e.g.*, *United States* v. *Campanile*, *supra*, 516 F.2d at 292-93; *United States* v. *Miller*, *supra*, 478 F.2d at 1318. Cf., *United States* v. *Magnano*, 543 F.2d 431 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3558 (February 22, 1977); *United States* v. *Natale*, 526 F.2d 1160 (2d Cir. 1975). Thus, as Judge MacMahon found, there was a proper basis for admission of the two Prudential robberies as similar acts.*

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* Proof of the first Prudential robbery also had relevance on the issue of Cranshaw's motive to rob the Chemical Bank. Cranshaw admitted to Wichner that the first robbery had been occasioned by his mother's need for money and that he had immediately delivered the proceeds to her. From that statement, coupled with other evidence (GX 13, 13a), the jury could reasonably have inferred that his mother's economic situation and his adherence to an expensive lifestyle created a motive for Cranshaw to join forces with Lewis and others in robbing the Chemical Bank. See *United States* v. *Egenberg*, 441 F.2d 441 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971); *United*

[Footnote continued on following page]

Cranshaw further objects that neither of the Prudential robberies was sufficiently "similar" to the Chemical robbery to justify their admission as similar acts. This claim proceeds on an erroneous understanding of the governing standard for admissibility of prior unlawful acts and, further, understates the apparent similarities of the Prudential acts to the bank robbery charged in the indictment.

In this Circuit the focus of attention in admitting prior unlawful acts is the similarity of *conduct*, rather than proof of a confluence of physical characteristics or elements of both crimes. See, e.g., *United States* v. *Santiago*, *supra*, 528 F.2d at 1134; *United States* v. *Leonard*, *supra*, 524 F.2d at 1091.

Measured against this standard, it bears emphasis that on October 7, 1976 Cranshaw, in one confession, admitted to participation in four bank robberies, each of which took place in New York City and all within a time-span of shortly over one month. In three of the bank robberies—including the second Prudential holdup, the Chemical robbery charged in the indictment and the Manufacturers robbery—Frank Lewis was an active participant.* From the surveillance photographs in both the first Prudential and Chemical holdups it appears that Cranshaw, without masked disguise, openly walked up to the tellers' counter to announce the robbery. Admittedly, the first Prudential

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States v. *Johnson*, 525 F.2d 999, 1006 (2d Cir. 1975). See also, *United States* v. *Polansky*, 418 F.2d 444 (2d Cir. 1969); *United States* v. *Caci*, 401 F.2d 664, 670 (2d Cir. 1968), *vacated per curiam on other grounds sub nom. Giordano* v. *United States*, 394 U.S. 310, *cert. denied*, 394 U.S. 917, 394 U.S. 931 (1969).

* Indeed, the Government's proof showed that the second Prudential robbery was the commencement of a common pattern of bank robberies by Lewis and Cranshaw.

robbery was perpetrated by Cranshaw alone, whereas the other three robberies involved more than one participant. But this distinction is hardly sufficient to have precluded introduction of the July 29 robbery, especially given the closeness in time to the Chemical robbery. Short of a requirement that the crimes being tried must match in identical detail those which the Government has sought to introduce as similar acts—a requirement which this Court has never imposed *—plainly the two Prudential bank robberies constituted sufficiently related conduct to warrant admission as prior similar acts.

Finally, Cranshaw argues that the probative value of the prior acts was outweighed by their prejudicial effect. This claim, however, is substantially diminished by the fact that the proof of the Prudential robberies was far less inflammatory or likely to create prejudice than that of the Manufacturers robbery, admission of which Cranshaw does not challenge. Indeed, the latter robbery involved Cranshaw brandishing a firearm in the bank and the firing of gunshots by Frank Lewis at a pursuer during the course of the getaway. Moreover, Cranshaw's argument ignores the broad discretion enjoyed by the district judge in admitting similar-act evidence, *United*

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* Indeed, this Court has approved the admission of evidence of other crimes far less similar to those being tried than the three bank robberies in question here. Thus, for example, in *United States* v. *Leonard*, *supra*, a prosecution for filing false income tax returns, this Court approved the introduction of evidence that the defendant submitted a false affidavit to the Internal Revenue Service which stated that he had no foreign bank accounts. Similarly, in *United States* v. *Kaufman*, 453 F.2d 306 (2d Cir. 1971), the defendant's tax returns, which contained false information, were admitted into evidence as similar acts in a prosecution for filing false affidavits under the Soldiers' and Sailors' Civil Relief Act. See also, *United States* v. *Williams*, 470 F.2d 915 (2d Cir. 1972).

States v. *Santiago*, *supra*, 528 F.2d at 135, as well as the exceedingly narrow scope of this Court's review of Judge MacMahon's decision. *United States* v. *Leonard*, *supra*, 524 F.2d at 1092.* Before permitting the similar act evidence to be adduced, Judge MacMahon listened to extensive argument by counsel on several occasions. (Transcript of November 9, 1976, pre-trial conference 151-54; Tr. 2-3, 121, 127-30; App. 128-34; 236-45). Indeed, the trial court expressly refused to rule on the similar act question at the beginning of the trial, in favor of awaiting the development of the record at the time the Government sought to introduce this evidence. (Tr. 2-3; App. 64). Judge MacMahon carefully considered the arguments of both sides with respect to the admissibility of the evidence concerning the Prudential robberies and, after deliberate study, concluded that such evidence was admissible:

> "The Court: I am going to admit it. I think they are sufficiently related in both sequence, in the time, in the interrelated nature of the operations, on the questions of intent, motive, identity,

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* "In any case, the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain. We said in *United States* v. *Ravich*, 421 F.2d 1196, 1203-04 (2d Cir.), *cert. denied*, 400 U.S. 834, 91 S.Ct. 69, 27 L.Ed. 2d 66 (1970), citing *Cotton* v. *United States*, 361 F.2d 673, 676 (8th Cir. 1966); and *Wangrow* v. *United States*, 399 F.2d 106, 115 (8th Cir.), *cert. denied*, 393 U.S. 933, 89 S.C. 292, 21 L.Ed. 2d 270 (1968), that 'his determination will rarely be reversed on appeal.'" 524 F.2d at 1092.

See also, United States v. *Cheung Kin Ping*, Dkt. Nos. 76-1362, 76-1368, slip op. 2063, 2071 (2d Cir., February 28, 1977).

common plan, opportunity. I think it meets the classic situation where it is admissible; that its probative value does outweigh its prejudicial effect. Surely that is so—one other robbery is going in anyway. It seems to me that adding two more isn't going to greatly tip the scale as prejudicial. The issue of identity here is so close that I think in the interest of justice it requires the admission of this evidence." (App. 134).

Finally, Judge MacMahon gave a proper and complete limiting instruction in his charge to the jury * which was clearly "sufficient to protect the [defendant] from any

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* Judge MacMahon charged the jury:

Now, the government claims that the defendant Claxton participated in another bank robbery and that the defendant Cranshaw committed three other bank robberies. It is for you to decide whether the evidence shows such participation by these defendants in other bank robberies. If you find that the defendant whom you are considering did commit one or more other bank robberies *you must not jump to the conclusion that he therefore committed the bank robbery charged here. Obviously, the mere fact that an accused has committed some other crime is not proof that he committed the crime charged here.*

Nor are you to conclude that because the accused committed other bank robberies he is a person of such bad character or of such bad character traits that he likely committed the bank robbery charged here. You may, however, consider whether those other bank robberies were so distinctively similar in the method, manner, pattern, timing, number of robberies, type of disguises and style of operation and execution as to indicate that those robbers and the robbers of the Chemical Bank were the same people or identical.

You may also consider such evidence on the question of whether the defendants knowingly joined together in a common and continuing plan or scheme or venture to rob banks.

You may also consider such evidence on the issues of motive, opportunity, intent, knowledge, and the absence of mistake or accident. (App. 212-13). (Emphasis supplied).

undue prejudice . . . ." *United States* v. *Cheung Kin Ping*, *supra*, slip op. at 2071.*

POINT II

Cranshaw's Statement About The Second Prudential Robbery Was Sufficiently Corroborated.

Cranshaw argues that Agent Wichner's testimony as to Cranshaw's post-arrest confession to the second Prudential robbery was not corroborated and, therefore, should not have been admitted. In so arguing defendant seeks to lift out of context one portion of his overall and continuous post-arrest admissions and thereby misapplies the authority he cites in support.

In a single oral confession following his arrest, Cranshaw admitted participation in the August 30 Chemical robbery, the September 8 Manufacturers' robbery and the July 29 and mid-August Prudential robberies. Use of this confession in Cranshaw's trial for the Chemical holdup required no more than independent evidence to substantiate the general reliability of the confession taken as a whole. The Government was not required to cor-

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* Even if Judge MacMahon committed error in admitting the Prudential similar act evidence, which we vigorously contend he did not, the error was harmless. *See United States* v. *Williams*, 523 F.2d 407 (2d Cir. 1975). The Government's evidence —which included Cranshaw's confession, an in-court and out-of-court eyewitness identification, surveillance photographs and the uncontestedly proper proof of the subsequent Manufacturers robbery in which Cranshaw participated—was extremely powerful and plainly demonstrated Cranshaw's guilt.

roborate every part of the defendant's post-arrest statements.*

In corroborating Cranshaw's confession, the Government introduced not only identification testimony from Graham and the signed surveillance photograph—with respect to the Chemical robbery—but also offered a surveillance photograph of defendant committing the July 29 Prudential robbery (GX 18), a Polaroid photograph taken from Cranshaw's person at the time of his arrest which depicted Cranshaw and his partner Lewis (GX 13a) and surveillance photographs and testimony concerning the Manufacturers robbery in which Lewis also participated. (App. 84-86; Tr. 133-34; GX 16, 19, 20.) In sum, the Government introduced "substantial independent evidence which would tend to establish the trustworthi-

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* *Opper* v. *United States*, 348 U.S. 84 (1954), and *Smith* v. *United States*, 348 U.S. 147 (1954), cited by Cranshaw in support of his position, require no more. Thus, in *Opper* the Supreme Court emphasized:

> "[T]he corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. . . It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt."

348 U.S. at 93. Similarly, in *Smith*, the Supreme Court said:

> "All elements of the offense must be established by independent evidence or corroborated admissions, *but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused.*"

348 U.S. at 156. (Emphasis added).

ness" of Cranshaw's confession. *Opper* v. *United States*, *supra*.*

POINT III

The Trial Court Did Not Commit Error By Giving Its Joint Venture Charge.

A. The Trial Court's Joint Venture Charge Was Not an Unconstitutional Addition to the Indictment.

Relying principally on *United States* v. *Stirone*, 361 U.S. 212 (1960), Cranshaw contends that the trial court's charge on joint venture or common plan amounted to an unconstitutional addition to the indictment. This argument is patently frivolous. There is no requirement that a joint venture, common plan, conspiracy or any other legal theory be particularized in an indictment, nor does defendant cite any authority for such a novel proposition.

It has long been the rule in this Circuit that the acts of one member of a joint venture in furtherance of the venture are binding upon his co-venturers. *Pinkerton* v. *United States*, 328 U.S. 640, *reh. denied*, 329 U.S. 818 (1946); *United States* v. *Stassi*, 544 F.2d 579, 584 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3584 (Feb-

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* Assuming *arguendo* that the Government was required to establish the specific reliability of Cranshaw's admission to the second Prudential job, this burden was satisfied by the photograph of Cranshaw with Lewis—a co-participant in the mid-August robbery—as well as the independent corroboration of the first Prudential robbery which, by inference, supported the truthfulness of the admission to the second. Moreover, even if greater corroboration for the second Prudential robbery was required, the error, if any, was surely harmless. *See* p. 16 n *, *supra*.

ruary 28, 1977); *United States* v. *Marchisio*, 344 F.2d 653, 668 (2d Cir. 1965), *United States* v. *Annunziato*, 293 F.2d 373, 378 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961); *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945); *United States* v. *Olweiss*, 138 F.2d 798, 800 (2d Cir.), *motion for leave to file petition for cert. nunc pro tunc denied*, 321 U.S. 744 (1944).

In the instant case, the Government's evidence clearly established the existence of a joint venture to rob banks between Cranshaw, Lewis and others, which commenced at least as early as mid-August, 1976, and continued without interruption to the time of Cranshaw's arrest on October 7. The evidence plainly demonstrated that the August 30 Chemical robbery charged in the indictment was pursuant to and a foreseeable act of the venture in which Cranshaw, Lewis and the others participated.* Accordingly, there can be no dispute, nor does Cranshaw appear to raise any, that the joint venture charge presented a permissible theory of liability which was fully justified by the evidence. Rather, Cranshaw apparently argues that, absent specific notice in the indictment of a joint venture theory, it was error for the trial court to instruct the jury on the law of joint venture. Cranshaw's contention is plainly wrong.

Rule 7(c) of the Federal Rules of Criminal Procedure provides that an "indictment shall be a plain, concise and definite written statement of the essential *facts* constituting the offense charged." Fed. R. Crim. P. 7(c)(1) (emphasis supplied). While the indictment must give the accused fair notice of the essential facts of his offense,

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* In his confession, Cranshaw admitted that Lewis participated in the robberies at the Prudential, Chemical and Manufacturers banks. Indeed, Cranshaw told agent Wichner that he and Lewis were scheduled to meet that very day to discuss yet another robbery (App. 88). Surveillance photographs of the Chemical and Manufacturers robberies showed a similar mode of operation in each robbery. (*Compare* GX 1-3 *with* GX 19-20.)

there is no burden upon the Government or the grand jury to spell out the legal theory of the prosecution. *United States* v. *Groopman*, 147 F.2d 782 (2d Cir.), *cert. denied*, 326 U.S. 745 (1945).*

Cranshaw's reliance on *United States* v. *Stirone*, *supra*, is misplaced. *Stirone* is no more than a case where the trial court's charge invited a fatal factual variance beyond

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* It is clear that even in the absence of a specific conspiracy charge or aiding and abetting charge in an indictment, a defendant may be convicted on such a theory of vicarious liability where the facts warrant its application. Thus, in *United States* v. *Pinkerton*, 151 F.2d 499, 500 (5th Cir. 1945), *aff'd*, 328 U.S. 640, *reh. denied*, 329 U.S. 813 (1946), the Fifth Circuit expressly held:

> "In deciding the guilt or innocence of the defendants on the several counts charging substantive offenses, the jury could weigh all the foregoing circumstances in determining whether these two appellants were in fact in a conspiracy in the acts that constitute the violations in the manner and form set out in the counts charging substantive offenses, *and this would be true if there had been no conspiracy count in the indictment.*
>
> *'Although conspiracy be not charged,* if it be shown by the evidence to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all.' *Davis* v. *United States*, 5 Cir., 12 F.2d 253, 257." (Emphasis supplied).

Accord, *Nye & Nissin* v. *United States*, 168 F.2d 846, 853-54 (9th Cir. 1948), *aff'd*, 336 U.S. 613 (1949).

In the present case, Judge MacMahon also instructed the jury on the theory of aiding and abetting. Defendant claims no error in the giving of that charge, notwithstanding the fact that there was no "aiding and abetting" language in the indictment. Nor could error be claimed, for it is well established that "[one] indicted as a principal may be convicted on evidence showing that he merely aided and abetted." *United States* v. *Russo*, 284 F.2d 539, 540 n.1 (2d Cir. 1960), citing, *inter alia*, *Jin Fuey Moy* v. *United States*, 254 U.S. 189 (1920), and *United States* v. *Knickerbocker Fur Coat Co.*, 66 F.2d 388 (2d Cir.), *cert. denied*, 290 U.S. 673 (1933); *accord*, *United States* v. *Ramsey*, 374 F.2d 192, 196 (2d Cir. 1967).

the specific facts alleged in the indictment. The error in *Stirone* did not relate to a possible alternative legal theory upon which the jury might have convicted the defendant, but to a factual premise totally different from that charged in the indictment.*

In the present case, the indictment charged Cranshaw and Claxton with bank robbery and related offenses. Additionally, each was charged with having aided and abetted another to commit these offenses. The trial court's charge of joint venture as an alternative legal theory upon which conviction might rest in no way departed from the facts set forth in the indictment.

B. Cranshaw Was Not Prejudiced by the Alleged Failure of the Trial Court to Inform Him of its Intention to Give a Joint Venture Charge.

Cranshaw's final contention is that he was prejudiced by the trial court's alleged failure to advise him specifically that a joint venture charge would be given. He claims that had he known a joint venture charge was in the offing his counsel would have made a stronger

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* Although not cited by defendant, *United States* v. *San Juan*, 545 F.2d 314 (2d Cir. 1976), is similarly inapposite. In *San Juan*, this Court reversed defendant's conviction with directions that the information be dismissed, where a serious doubt existed that defendant had violated the Bank Secrecy Act, 31 U.S.C. §§ 1058 and 1101(a) and (b). Although reversal rested on the possibility that the court's charge invited conviction on a *factual* theory expressly disavowed by the Government, the *San Juan* Court made it clear that, as a matter of law, the alternative factual theory could not have supported conviction. *San Juan* is thus far different from the case at bar where the facts proved supported conviction under any one of several legal theories of liability.

effort to cast doubt on Cranshaw's participation in the similar act robberies. (Appellant's Br. 21-24.) This argument, made out of desperation, is totally without merit.

In the first place, Cranshaw's claim of surprise is dubious. On several occasions during the trial the prosecutor stated that the similar act evidence should be admitted because it went, among other things, to the issue of whether or not the Chemical robbery was part of a common plan. (App. 236-45; Tr. 129). Indeed, at the Rule 30 conference * prior to summations, in connection with its rulings on the proposed charges on "similar acts", the court expressly informed counsel of its intention to charge the jury:

> "You may also consider [the similar act proof] on the issue of whether the robbery of the Chemical Bank was part of a common plan or scheme by the defendants." (App. 142).

All counsel were thus well aware that common plan or joint venture was to be discussed in the court's charge.

Moreover, Rule 30 does not require the trial court to inform counsel of each of the matters it intends to include in the charge. Rather, the rule provides that counsel may submit requests to charge and that "[t]he court shall inform counsel of its actions *upon the requests* prior to their arguments to the jury . . . ." Fed. R. Crim. P. 30. (emphasis supplied.)** The trial court complied

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* Fed. R. Crim. P. 30.

** There is no requirement that the trial court furnish the text of its jury charge to counsel prior to their summations. *United States* v. *Isaacs*, 493 F.2d 1124, 1163 (7th Cir.), *cert. denied*, 417 U.S. 976, *reh. denied*, 418 U.S. 955 (1974); *United States* v. *Price*, 444 F.2d 248 (10th Cir. 1971).

with this requirement and, indeed, painstakingly worked out acceptable language where there was a dispute. (App. 138-55).

Finally, even if Cranshaw was not aware of the court's intention to charge on joint venture, he suffered no prejudice. Given the Government's strong independent proof of Cranshaw's direct involvement in the Chemical robbery, Cranshaw's counsel argued extensively that defendant's confession had been manufactured by the FBI agent. (App. 182-92). Since Cranshaw's single confession touched upon all four robberies proved in the case, defense counsel had the opportunity and reason—if he thought it tactically wise—to attack the proof of the similar acts to the extent that they corroborated the reliability of Cranshaw's admissions. In the face of unimpeachable evidence that Cranshaw had participated in the first Prudential (App. 86-88; GX 18) and Manufacturers robberies (App. 84-86; GX 16, 19, 20), however, such a course clearly would have been folly. In sum, defense counsel could not have mounted a credible argument that Cranshaw did not commit those robberies, and his failure to do so was dictated by the evidence and trial tactics, not by any false expectations as to the court's charge.

Thus, even if error was committed by the trial court's giving of a joint venture charge, defendant was not prejudiced * and such error, therefore, should not occasion reversal of the conviction.

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* Cranshaw's claim of prejudice is dissipated by the fact that Claxton, an alleged co-venturer in the Chemical and Manufacturers robberies, was acquitted. The jury, therefore, necessarily found that Cranshaw and Claxton were *not* joint venturers with respect to the Chemical robbery. The only remaining possible partner for Cranshaw was Frank Lewis and the proof of Lewis' involvement

[Footnote continued on following page]

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT B. MAZUR,
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in the Chemical robbery came from Cranshaw's admissions. Thus, in order for Cranshaw to have been convicted solely on a joint venture theory, the jury would have had to find that Cranshaw was telling the truth about his relationship with Lewis and Lewis' participation in the Chemical robbery, but at the same time fabricated his own role in the scheme, a finding that simply strains credulity.

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

ROBERT B. MAZUR, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 14th day of March, 1977, he served a copy of the within Brief for the United States of America, by placing the same in a properly postpaid franked envelope addressed:

JOHN H. DOYLE, III, ESQ.
630 Fifth Avenue
New York, New York 10020

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Robert B. Mazur
ROBERT B. MAZUR

Sworn to before me this

14 day of March, 1977.

Gladys D. D'Angelo

GLADYS D. D'ANGELO
NOTARY PUBLIC, State of New York
No. 5[illegible], Suffolk County
Term Expires March 30, 1979